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United States Senate

COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS

WASHINGTON, DC 20510-6175

RICHARD M. RUSSELL, MAJORITY STAFF DIRECTOR
MARY FRANCES REPKO, MINORITY STAFF DIRECTOR

February 26, 2020

The Honorable Sean O'Donnell
Inspector General
U.S. Environmental Protection Agency
1301 Constitution Ave. NW, Room 3102
Washington, DC 20460

Dear Inspector General O'Donnell:

I write to ask that the Office of the EPA Inspector General (IG) commence an investigation into whether EPA officials are improperly seeking to circumvent section 307¹ of the Clean Air Act, Executive Order 12866², and other rulemaking review and procedural requirements.³ I make this request in light of irregularities I have learned about that are related to two high-profile ongoing rulemakings. For example, I have been informed by multiple sources that EPA political officials appear to be trying to conceal EPA comments that are critical of the draft final Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule⁴ that was submitted to the White House Office of Information and Regulatory Affairs (OIRA) on January 14, 2020. Instead of transmitting these materials to OIRA as part of the interagency review process, which is a standard and lawful process that would also result in their public release once the rule is finalized, hard copies of these materials are being shared only with the Department of Transportation (DOT). I have learned of similar irregularities in the intra- and inter-agency processes associated with the preparation of a supplemental notice of proposed rulemaking of the Strengthening Transparency in Regulatory Science Rule (the so-called secret science rule).

The information below provides a glimpse into troubling and seemingly purposeful efforts to avoid the standard processes associated with proposing and finalizing rules, some of which may be unlawful. My office has been provided with additional relevant details by several individuals who have asked that this information not be provided to you in written form because they fear doing so could lead political officials to identify them and take retaliatory action. However, the information can be provided verbally following your review of this request, provided an assurance that you and your staff commit to take all necessary measures to protect the identities of those who may have exercised their lawful right under 5 U.S.C. § 7211 to provide information to Congress without fear of retaliation due to their disclosures.

¹ <https://www.law.cornell.edu/uscode/text/42/7607>

² https://www.reginfo.gov/public/jsp/Utilities/EO_12866.pdf

³ [https://yosemite.epa.gov/sab/sabproduct.nsf/5088B3878A90053E8525788E005EC8D8/\\$File/adp03-00-11.pdf](https://yosemite.epa.gov/sab/sabproduct.nsf/5088B3878A90053E8525788E005EC8D8/$File/adp03-00-11.pdf)

⁴ Part 1, which was finalized in September 2019, unlawfully implemented preemption and revocation of California's authority to set more stringent vehicle greenhouse gas standards.

The Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule

EPA's concerns with the 2018 proposed SAFE vehicles rule to roll back vehicle greenhouse gas and fuel economy standards were properly and well documented^{5,6} in the OIRA rulemaking docket. These concerns, which were apparently ignored by DOT as DOT wrote what it characterized as a joint DOT-EPA rule without EPA's input, included a wide range of issues related to the proposed rule's assumptions about the costs and effectiveness of fuel-efficient technologies, safety, and consumer driving habits. During the inter-agency review of the proposed rule, EPA even made the observation that "EPA analysis to date shows significant and fundamental flaws in CAFE model... These flaws make the CAFE model unusable in current form for policy analysis and for assessing the appropriate level of the CAFE or GHG standards." When the proposed rule was published on August 2, 2018, the EPA documents that described concerns were published shortly thereafter, in keeping with section 307 of the Clean Air Act which states that:

"The drafts of proposed rules submitted by the Administrator to the Office of Management and Budget for any interagency review process prior to proposal of any such rule, all documents accompanying such drafts, and all written comments thereon by other agencies and all written responses to such written comments the Administrator shall be placed in the docket no later than the date of proposal of the rule."

Once the public became aware of EPA's critical views about the SAFE vehicles proposal, numerous press stories further described the extent of these concerns, the legal risks to the rule that were exposed by the EPA critiques, and the apparent failure by DOT to include EPA's feedback prior to the publication of what was characterized as a joint EPA-DOT proposal. For example, one story said⁷ that EPA Administrator Andrew Wheeler feared that the rule's "legal and technical arguments are weak and will set up the Trump administration for an embarrassing courtroom loss." A second story, describing the depth of EPA's technical concerns with the DOT analysis and DOT's failure to correct the problems, said that EPA had even requested that its logo be removed from the proposal's documents.⁸ Another story reported that "for two years, rival bureaucrats at NHTSA and overworked Trump political appointees stonewalled the EPA team, blocked it from learning of the rollback, and prevented it from seeing analysis of the new rule," and that the DOT analysis included a "turducken of falsehoods."⁹ My office has learned that EPA, OMB and DOT political officials were angered by the very public airing of the inter-agency disagreement about this rule that resulted from the lawful submittal of written materials created during the review of the proposal to the docket.

⁵ See the June 18, 2018 email from William Charnley which can be accessed at <https://www.regulations.gov/document?D=EPA-HQ-OAR-2018-0283-0453>

⁶ <https://www.carper.senate.gov/public/index.cfm/2018/10/carper-urges-chao-wheeler-to-abandon-plan-to-dismantle-clean-car-standards>

⁷ <https://www.nytimes.com/2018/07/27/climate/trump-auto-pollution-rollback.html>

⁸ <https://www.eenews.net/climatewire/stories/1060094235/>

⁹ <https://www.theatlantic.com/science/archive/2020/02/an-inside-account-of-trumps-fuel-economy-debacle/606346/>

Although the rule was originally proposed on August 2, 2018, it took until January 14, 2020 before what was characterized as a joint EPA-DOT draft final rule was submitted to OIRA for review. However, as a letter I sent to the Administrator of OIRA following a review of a draft that was obtained by my office made clear,¹⁰ the so-called ‘draft final rule’ appears “to consist only of the DOT rule’s preamble, includes some apparent typographical and other errors, and placeholders for analysis and narrative sections that have seemingly not yet been written. It is also my understanding that EPA did not submit a draft final preamble for its rule to OIRA, and that no draft final Regulatory Impact Analysis nor draft Final Environmental Impact Statement have been submitted for interagency review.” The letter I sent also observed that the rule “would dramatically weaken future vehicle fuel economy and greenhouse gas standards, without providing the purported safety or economic benefits that were touted by the Trump Administration. In short, the SAFE Vehicles rule, if finalized in its present form, will lead to vehicles that are neither safer, nor more affordable or fuel-efficient.” Media¹¹ reports¹² also described these problems, noting that the draft final preamble was missing so much information that there were 111 sections marked “text forthcoming.”

In recent weeks, my office has been informed of a number of irregularities associated with the preparation and review of this draft final rule. Specifically:

- I have learned that as with the proposed rule, DOT appears to have been the sole agency that wrote the document that has been characterized as a joint EPA-DOT product that EPA never saw in its assembled form until it was submitted to the OIRA docket by DOT. Indeed, EPA career experts had not seen roughly two-thirds of the analysis included in the draft final rule in any form whatsoever until inter-agency review commenced. Courts¹³ have¹⁴ repeatedly¹⁵ ruled that agencies can use external input and advice when writing regulations under their own statutory authorities, but must write the regulations themselves. The apparent absence of EPA authorship of its own Clean Air Act vehicle greenhouse gas emissions rule may be unlawful.
- As EPA career experts reviewed the draft final rule they were seeing for the first time, they were instructed not to submit materials to OIRA as part of the inter-agency review, unlike the process that was followed as the proposed rule was being prepared. Instead, hard copies of EPA’s technical feedback on the draft final rule have been provided to DOT outside the formal inter-agency review process. This has been described to my office as unprecedented by people with decades-long familiarity with the EPA rulemaking process. This would also seem to suggest the potential for an intent to run afoul of section 307 of the Clean Air Act, which states that:

¹⁰ <https://www.epw.senate.gov/public/index.cfm/2020/1/after-reviewing-draft-final-vehicles-rule-rollback-submitted-to-white-house-carper-urges-omb-to-abandon-the-trump-administration-s-flawed-safe-vehicles-rule>

¹¹ <https://www.washingtonpost.com/climate-environment/2020/01/23/trump-vowed-his-mileage-standards-would-make-cars-cheaper-safer-new-documents-raise-doubts-about-that/>

¹² <https://www.nytimes.com/2020/02/13/climate/trump-fuel-economy-rollback.html>

¹³ *U.S. Telecom v. FCC*, 359 F. 3d 554, 567-68 (D.C. Cir. 2004)

¹⁴ See the illustrative discussion in *Coalition for Responsible Regulation v. EPA* regarding EPA’s use of the IPCC reports in crafting the endangerment finding at 684 f.3d at 120

¹⁵ *Ergon-West Virginia, Inc. v. EPA*, No. 17-1839 (4th Cir. 2018)

“The drafts of the final rule submitted for such review process prior to promulgation and all such written comments thereon, all documents accompanying such drafts, and written responses thereto shall be placed in the docket no later than the date of promulgation”.

- Following the public release of my January 28, 2020 letter describing the incomplete nature of the ‘draft final rule’, DOT staff was directed to immediately prepare and submit for inter-agency review a draft final Regulatory Impact Analysis, which is a key document that was not included in the package DOT submitted to OMB in January. DOT has recently done so. However, this document is reportedly essentially identical to the draft preamble document that was submitted to OMB in January (except this new document is titled “Regulatory Impact Analysis”). DOT has also appeared to delete all 111 instances of the phrase “text forthcoming” from the draft final preamble without actually adding any new forthcoming text, and have submitted this ‘new’ draft final preamble document to the docket as well. However, DOT has failed to incorporate any of EPA’s technical feedback.

If no public record of EPA’s comments on the draft final rule are published in the docket because no electronic copies are ever shared with OIRA, there would not be any embarrassing and legally risky information related to flaws in the final rule available for review by the public or potential future litigants. The absence of such a record could also enable the agencies to improperly avoid creating and ultimately publishing the required red-lined document that shows the changes from what was originally submitted to the docket as a draft final rule with the rule that is ultimately finalized. However, a failure to include and eventually publicly release those materials would also be unlawful.

The Strengthening Transparency in Regulatory Science Rule

On April 24, 2018, former EPA Administrator Scott Pruitt signed¹⁶ a proposed rule entitled “Strengthening Transparency in Regulatory Science” Rule which seeks to limit the scientific studies that can be used in EPA rulemaking. The proposed rule has been criticized by a wide range of elected officials,¹⁷ scientific experts^{18,19} and other²⁰ stakeholders because of the potential that if implemented, it would violate the Administrative Procedure Act and other environmental laws that require the best available science to be considered, would bias the agency against using independent academic research and would result in less protective environmental rules.

¹⁶ <https://www.epa.gov/newsreleases/epa-administrator-pruitt-proposes-rule-strengthen-science-used-epa-regulations>

¹⁷ <https://www.carper.senate.gov/public/index.cfm/2018/4/carper-leads-epw-democrats-in-questioning-pruitt-s-effort-to-limit-epa-s-use-of-science>

¹⁸ https://science.sciencemag.org/content/360/6388/eaau0116?ijkey=ad15ef498c27731afb3c3fb3650793edbd1d57f9&keytype=tf_ipsecsha

¹⁹ <https://s3.amazonaws.com/ucs-documents/science-and-democracy/secret-science-letter-4-23-2018.pdf>

²⁰ <http://blogs.edf.org/health/files/2018/08/EDF-comments-on-censored-science-proposal-final.pdf>

In addition to these concerns, there were some notable procedural problems with the proposed rule:

- First, although the proposal stated that the rule was being promulgated subject (in part) to EPA's authority under some sections of the Clean Air Act, EPA failed to meet its statutory obligations under section 307 of that Act to submit and publish all data, information and analysis used to develop the rule to the docket at the time the rule was proposed.
- Additionally, although the EPA was required by law to consult with its Science Advisory Board prior to proposing this rule, the Science Advisory Board wrote²¹ to the EPA on June 28, 2018 and stated that it was first made aware of the proposal from media reports.
- Finally, although Executive Order 12866 requires the interagency review of proposed rules and their release by OIRA back to EPA prior to publication, records indicate that EPA submitted this proposed rule to OIRA on April 19 and it was signed and press-released by EPA on April 24, the day *before* OIRA released it back to EPA (although OIRA apparently subsequently and retroactively revised the published release date to April 23 after this violation of Executive Order 12866 was discovered by a reporter).²²

Perhaps in part because of these significant procedural defects, EPA Administrator Andrew Wheeler told²³ Congress in September 2019 that EPA would publish a supplemental proposal of this rule early in 2020, and EPA submitted a supplemental notice of proposed rulemaking to OIRA for inter-agency review in November, 2019. However, I have learned that much like the SAFE vehicles rule, the finalization of this supplemental proposed rule is not occurring using standard intra- and inter-agency processes. My office stands ready to provide yours with additional details verbally.

Thank you for your attention to this important matter. I trust you'll find the concern that EPA political officials may be failing to follow statutory requirements to properly and transparently document the agency's rulemaking activities as troubling as I do. If you have any questions or concerns, please ask your staff to contact Michal Freedhoff (Michal_Freedhoff@epw.senate.gov) of the Environment and Public Works Committee staff. I look forward to your prompt response.

Sincerely,



Thomas R. Carper
Ranking Member

²¹[https://yosemite.epa.gov/sab/sabproduct.nsf/LookupWebReportsLastMonthBOARD/4ECB44CA28936083852582BB004ADE54/\\$File/EPA-SAB-18-003+Unsigned.pdf](https://yosemite.epa.gov/sab/sabproduct.nsf/LookupWebReportsLastMonthBOARD/4ECB44CA28936083852582BB004ADE54/$File/EPA-SAB-18-003+Unsigned.pdf)

²² <https://www.eenews.net/greenwire/2018/04/27/stories/1060080331>

²³ <https://www.eenews.net/greenwire/2019/09/19/stories/1061139519>